In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-953

MICHAEL FARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that his conviction of assaulting a federal officer must be reversed because the court below held that his agreement to commit the offense did not independently constitute conspiracy punishable under federal law.

After a jury trial in the United States District Court for the Southern District of New York, petitioner and three co-defendants (Enriquito Alsondo, Ralph Feola, and Henry Rosa) were convicted of assaulting federal officers while the latter were engaged in the performance of official duties, in violation of 18 U.S.C. 111,

and of conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner was sentenced under the Youth Corrections Act, 18 U.S.C. 5010(b), 4209. The appeal of petitioner's three co-defendants was pursued separately,[1] prior to petitioner's appeal, and resulted in a reversal of the conspiracy convictions as to all three and of the substantive convictions as to Feola and Rosa (Pet. App. A 1a-12a). Subsequently, upon a petition for rehearing, the court below reinstated the substantive convictions of Feola and Rosa (Pet. App. B 13a-16a). At the same time, in a separate *per curiam* opinion, based upon these two decisions, the court reversed petitioner's conspiracy conviction while affirming the substantive conviction (Pet. App. C 17a-19a).[2]

The facts out of which the charges against petitoner and his co-defendants arose are detailed in the first opinion of the court below (Pet. App. A). On August 21, 1971, a federal undercover narcotics agent, Hall, met petitioner through an informer and arranged to purchase a kilogram of heroin. Several days later, Hall, the informer, undercover agent Lightcap, co-defendant Rosa and petitioner went to a Manhattan apartment where, the agents were told that co-defendants Alsondo and Feola were waiting to transact the sale. Hall displayed a roll of bills, claiming it to be the $17,000 purchase price. Alsondo, Rosa, and petitioner then took Hall and the informer into the apartment bedroom, where they dis-

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[1] *United States* v. *Alsondo, Feola,* and *Rosa,* 486 F. 2d 1339 (C. A. 2).

[2] The government has filed a petition for a writ of certiorari, No. 73-1123, seeking to review the lower court's reversal of Feola's conspiracy conviction. See note 3, *infra.*

played packages of white powdered sugar, which Alsondo said was heroin.

At this point, petitioner, Rosa and Alsondo left the room, whereupon Hall, on opening a closet door, discovered a man, who was later determined to be the apartment tenant, gagged and bound. As Hall proceeded to the hallway, he observed Alsondo begin to pull a revolver from his rear waistband. Hall shouted a warning to Lightcap, and they identified themselves as federal agents. After a fight, the two agents managed to subdue Alsondo. Lightcap then went into the living room, whereupon Rosa threw himself at the agent as if to flee, but was quickly apprehended. Petitioner, who had remained in the kitchen, was subsequently arrested, as was Feola who was discovered hiding in a closet.

The conspiracy count was submitted to the jury on the theory that there could be inferred an agreement among the defendants either to defraud the agents by selling sugar for $17,000 or in the alternative to rob the agents at gunpoint should they discover the fraud. As petitioner correctly points out, the basis for his substantive conviction was his participation in this conspiracy to defraud or rob the agents, because he did not personally engage in any physical confrontation with them. See *Pinkerton* v. *United States,* 328 U.S. 640. From this he argues that the substantive conviction must fall because the federal conspiracy charge was held invalid by the court below.

In its first opinion, the court below ruled that although knowledge of the federal status of the assault victim is not essential for a substantive conviction under 18 U.S.C. 111, such specific knowledge was required to support a conspiracy conviction, citing *United States* v. *Crimmins,* 123 F. 2d 271 (C.A. 2).

The court therefore held that the conspiracy convictions in this case could not stand, because the trial court had instructed the jury that such knowledge was not necessary.[3]

On rehearing, the court below held that although the federal conspiracy charge could not stand, the substantive charge against petitioner and Farr was valid because "the admissibility of acts of a joint criminal venturer against his partner in crime 'rests on basic principles of agency and not on the presence of a conspiracy count'" (Pet. App. B 15a; citation omitted). Since the jury had found petitioner guilty of conspiring to assault the officers (lacking only knowledge of their official status) the court deemed his agency fully established.

The court was correct in this holding, and nothing decided in *Pinkerton* v. *United States*, 328 U.S. 640, suggests a different result. Indisputably, petitioner agreed with his co-defendants either to defraud or rob the undercover agents. And under *Pinkerton*, *supra*, 328 U.S. at 645-647, he is liable for the substantive offense, since "so long as the partnership in crime continues, the partners act for each other in carrying it forward." There is no reason why this principle

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[3]Petitioner is inaccurate in stating that the government conceded during his appeal that the court below was correct in its ruling on the conspiracy issue (Pet. 6). The government simply agreed that the precedent of the earlier *Alsondo* decision would also require a reversal of petitioner's conspiracy conviction. In fact, we are currently petitioning this Court for a writ of certiorari on the conspiracy issue with respect to co-defendant Feola (*United States* v. *Feola*, No. 73-1123). The cases of the other three co-defendants, including petitioner, are not included in our petition because each received concurrent sentences on the conspiracy and substantive counts, whereas Feola was sentenced to prison only upon the conspiracy conviction.

should lose its force merely because it is held that a *federal* conspiracy has not been establshed. There was clearly here, as the court below held, both a joint criminal venture and a conspiracy punishable under local law (Pet. 15a-16a). Petitioner is thus plainly incorrect in characterizing the case as one in which the government was unable to demonstrate a viable criminal venture or conspiracy (Pet. App. 10a).

Indeed, it has uniformly been held that the acts of all participants in a criminal venture are admissible against a defendant whether or not a specific conspiracy is formally charged. *Davis* v. *United States*, 409 F. 2d 1095, 1100 (C.A. 5); *United States* v. *Jones*, 374 F. 2d 414, 418 (C.A. 2), certiorari denied, 389 U.S. 835; *United States* v. *Smith*, 343 F.2d 847, 849 (C.A. 6), certiorari denied, 382 U.S. 824; *Clune* v. *United States*, 159 U.S. 590, 593. Similarly, statements by co-conspirators are admissible against a defendant even if a conspiracy is not charged. *United States* v. *Weber*, 437 F. 2d 327, 337, n. 11 (C.A. 3); *Fuentes* v. *United States*, 283 F. 2d 537, 539-540 (C.A. 9); *United States* v. *Branker*, 418 F. 2d 378, 379-380 (C.A. 2). By the same token, there is no reason to free petitioner of criminal liability simply because a particular criminal scheme may not be punishable as a conspiracy under federal law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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